SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 868

JOHN HENRY SHOFFEITT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in ..... F.2d ..... A copy of the official opinion in this case is appended hereto.

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, John Henry Shoffeitt v. United States of America, Numbers 25490 and 26191, is dated November 25, 1968.

The jurisdiction of this Court is invoked under 26 U.S.C. 1254 (1), and under and by virtue of Title 18, U.S.C. 3772, within the time provided for in Rule XI and Rule 22 (2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of Federal Law and gravity and importance in the administration of criminal justice which have not been, but should be settled by this Court. Said Court has misconstrued and applied decisions of this Court respecting the application of legal principles, and has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

(c)

QUESTION PRESENTED FOR REVIEW

Does not the Federal Statute prohibiting the possession and sale of nontaxpaid distilled spirits violate petitioner's privilege against self incrimination guaranteed by the Fifth Amendment to the Constitution of the United States?

(d)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portion of the Fifth Amendment to the Constitution of the United States, provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . .".

Title 26, Section 5205 (a) (2), United States Code:

> "No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter."

Title 26, Section 5604 (a) (1), United States Code:

> "Any person who shall transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of Section 5602 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section; . . . shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both for each such offense."

(e)

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Northern District of Georgia for the offenses of possessing and selling nontaxpaid distilled spirits during September, 1966. Subsequently, he was indicted for a similar offense which occurred in December, 1966. The two indictments were tried separately, resulting in convictions on each of them. Separate appeals were prosecuted from the convictions, but in the United States Court of Appeals for the Fifth Circuit, the same were

consolidated for argument. A single opinion was rendered by that Court, a copy of which is contained in the appendix to this petition.

Each of the indictments charged petitioner on a stated date with having possessed and/or sold a quantity of distilled spirits, required to be stamped under the provisions of Section 5205 (a) (2), Title 26, United States Code, the immediate container thereof not having affixed thereto stamps evidencing the determination of the tax thereon or indicating compliance with the provisions of Chapter 51, Title 26, United States Code, in violation of Section 5604 (a) (1), Title 26, United States Code.

While the issues were contested in the trial Court, in view of the question presented here, it is not necessary to state in detail the facts shown by the evidence elicited upon the trial of the cases. While petitioner testified in his own behalf in each case and denied he was guilty of the offenses charged, the evidence, in short, justified a finding by the jury that on the dates charged in the indictment, petitioner possessed and sold to Federal Officers and to an undercover agent nontaxpaid whiskey.

While petitioner did not contest the indictments by filing a motion to dismiss the same, on appeal he maintained that his Fifth Amendment privilege against self incrimination, as interpreted by this Court in recent opinions, was a complete defense to the offenses charged. He insisted, in the circumstances, his failure to raise that issue at trial was not an effective waiver of that defense. While the United States Court of Appeals for the Fifth Circuit held that the Fifth Amendment privilege against self incrimination was not a defense to the charges contained in the indictment, it agreed that there had been no effective waiver of petitioner's right to assert such defense.

REASONS FOR GRANTING THE WRIT

The decision of the Court below has decided an important question of Federal Law which is contrary to the decisions of this Court in *Grosso* v. *United States*, 390 U.S. 62; *Marchetti* v. *United States*, 392 U.S. 39; and *Haynes* v. *United States*, 392 U.S. 85.

The above decisions had their premise in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70. The authorities thus relied upon hold, in substance, that one cannot be prosecuted for the failure to perform an act which, under the conditions there present, would require him to incriminate himself, if his assertion of constitutional privilege were timely made.

The specific offenses for which petitioner stands convicted, as charged in the indictments, are that, on the dates specified, he possessed and sold nontaxpaid distilled spirits in violation of 26 U.S.C. 5205 (a) (2) and 5604 (a) (1). The possession and sale of Georgia untaxpaid distilled spirits is likewise a criminal offense. Georgia Code of 1933, 58-1046 (7) (c).

Title 58, Code of Georgia Annotated, deals extensively with the subject of intoxicating liquors. At the outset, it is to be noted that the violation of any of the provisions of that title for which no specific penalty is provided, or the violation of any rule or regulation issued pursuant to that title, is a misdemeanor. Georgia Code 58-1069, 58-123. These provisions are similar to the provisions of the Internal Revenue Code, 26 U.S.C. 5687, which relate to violations of federal statutes and regulations having reference to distilled spirits.

As was observed in *Marchetti*, 26 U.S.C. 6107 requires that proper authorities of the Internal Revenue Service

make available to state authorities upon request, the information made available to it with respect to persons who have paid special taxes under Subtitle E of the Internal Revenue Code, dealing with alcohol, tobacco and certain other excise taxes.

Without discussing in detail the State statutes, it is sufficient to say that they set forth a comprehensive system of control of intoxicating liquors so that, with exceptions not applicable here, it is unlawful to possess, sell, offer for sale, transport or manufacture such spirits. In the prosecution of any person under State law for the violation of Title 58, Georgia Code Annotated, "Any application for an Internal Revenue special tax receipt of the United States, as required by the laws of the United States, or any Internal Revenue special tax receipt, as required by said laws for retail or wholesale of spirituous liquors in Georgia is prime facie evidence of guilt of the offense charged." Georgia Code Annotated 58-113.

Before passing to further discussion, we observe that, under the Georgia Statutes, a manufacturer, 58-1024; wholesaler, 58-1025; and/or retailer, 58-1026, of distilled spirits is required to acquire a license and pay a license fee. A special tax is imposed on all distilled spirits imported into or manufactured within the State. 58-1046 (1). A stamp evidencing the tax is required to be affixed to containers of spirits, 58-1046 (4), and it is unlawful to possess such spirits without the stamp having been affixed. 58-1046 (7) (c).

It is to be observed that the payment of any tax imposed by the Internal Revenue Laws for the carrying on of a trade or business does not exempt any person from penalty or punishment provided by state laws or in any manner authorize the commencement or continuance of

such trade or business contrary to the laws of the states. 26 U.S.C. 5145.

At the same time, as shown above, by statute, the federal authorities are required, upon request, to furnish the state authorities with information made available to them by one who has complied with the federal statutes.

In *Albertson*, this Court held that an order by the Attorney General of the United States requiring members of the Communist Party to register was violative of the members' Fifth Amendment privilege against self incrimination, since the information obtained could be used to prosecute the registrant under federal law. In *Marchetti*, *Grosso*, and *Haynes*, this Court upheld the petitioners' claims that they could not, consistent with the exercise of their Fifth Amendment privilege against self incrimination, be prosecuted for violations of federal statutes requiring registration and payment of special excise and occupational taxes. The latter case, *Haynes*, involved the possession of a nonregistered firearm. The statute made it a crime to possess a firearm which had not been registered as required by 26 U.S.C. 5841. The registration statute, in that case, required every person possessing a certain type firearm to register it. This Court held that the self incrimination claim was good as a defense to a prosecution for failing to register.

With reference to the possession and sale of distilled spirits, 26 U.S.C. 5205 (a) (2) and 5604 (a) (1), as charged in the present indictments, the charges are closely related to, if not indistinguishable from, the possession of the unregistered firearm in *Haynes*. In order to acquire and place the stamps on the containers, it is essential that there be involved in the production of the spirits a registered distillery and that the bond required by the statutes be first posted. 26 U.S.C. 5171, 5173 and 5179. In such

cases, the tax is paid on the basis of a return which must be filed, 26 U.S.C. 5061, and the stamps are issued under the regulations of the Secretary. 26 U.S.C. 5205 (3). Yet, the registration of a distillery, the giving of bond, the filing of a distilled spirits tax return, the acquisition of stamps for the payment of the tax, imposes upon the person so affected, a duty to incriminate himself both under state and federal law, whether such acts be performed by him directly or indirectly. 18 U.S.C. 24.

Accordingly, the vice found by this Court in *Marchetti, Grosso,* and *Haynes,* supra, is present here. The rationale applied there is applicable here.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for writ of certiorari should be granted and that this Court should determine that the Court below erred in the respects herein urged.

Respectfully submitted,

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ROBERT B. THOMPSON
Attorney for Petitioner

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 25490 and 26191

JOHN HENRY SHOFFEITT,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Northern District of Georgia

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(November 25, 1968)

Before WISDOM and AINSWORTH, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge: These two cases were consolidated by order of this Court entered September 24, 1968. In No. 25490, Shoffeitt was convicted by a jury on one count of an indictment charging him with selling and possessing distilled spirits, the immediate containers not having affixed thereto the required tax stamps in violation of 26 U.S.C. § 5604(a)(1). In No.

26191, Shoffeitt was convicted by a jury on two counts of an indictment charging him with another violation of § 5604(a)(1) and with concealing nontaxpaid distilled spirits in violation of 26 U.S.C. § 5601(a)(12). No recitation of the facts is required inasmuch as only bald questions of law are raised on appeal. Shoffeitt maintains that the Fifth Amendment privilege against self-incrimination, as interpreted in the recent trilogy, *Grosso* v. *United States*, 390 U.S. 62; *Marchetti* v. *United States*, 392 U.S. 39; and *Haynes* v. *United States*, 392 U.S. 85, is a complete defense to the offenses charged. He further maintains that, in the circumstances, failure to raise the issue at trial is not an effective waiver of that defense.

We agree that there has not been an effective waiver. The Government concedes that it would have been useless to raise the self-incrimination issue at the time of the trial, i.e., prior to *Grosso*, *Marchetti* and *Haynes*. The Supreme Court held in *Grosso*, *supra*, at 71, that there was no effective waiver because at the time of trial there were cases expressly upholding the statutes under which Grosso was convicted. Both §§ 5601 and 5604 were held constitutional in *Ramsey* v. *United States*, 245 F.2d 295 (9th Cir. 1957), although it is not clear that the challenge was specifically on Fifth Amendment grounds. Even were there no case holding the statutes constitutional, a contrary holding was so implausible prior to the trilogy that the non-waiver rationale of *Grosso* seems fully applicable here.

Turning to the merits, we are not surprised, in view of the recent trilogy, to find appellant making the Fifth Amendment argument. Indeed, Chief Justice Warren predicted it in his dissent. *Grosso*, *supra*, at 83. Shoffeitt suggests significant similarities between the statutes regulating the production and sale of liquor and the gambling statutes involved in *Grosso* and *Marchetti*. The Govern-

ment, on the other hand, has urged some persuasive distinctions—distinctions which the language of the three cases seems to invite. We need not reach those issues, however, as we are clear to the conclusion that appellant has not cleared the first hurdle: showing some possibility of self-incrimination. We find no basis for a conclusion that these statutes require anyone to give information to the Government about anything.

The statutes under which Shoffeitt was convicted do not on their face require the "possessor" or "concealor" of nontaxpaid whiskey to pay the tax, to file a return, or to register with the Government in any other manner. We note that appellant appears to make no such contention. We believe that such a contention would not be tenable when the statutory scheme is viewed as a whole. 26 U.S.C. § 5005(b)(1) provides:

> "Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distilling apparatus, or distillery, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits *produced* therefrom." (Emphasis added.)

The statutory language "every person in any manner interested in the use of" is broad and has been broadly construed. See *e.g.*, *Dougherty* v. *Lewis*, 115 F.2d 478 (C.C.A. Cal. 1940); *United States* v. *Wainer*, 211 F.2d 669 (7th Cir. 1954). But we have found no case suggesting that the language reaches a possessor or concealor. Nor would we expect to find such a case. A tax on possession of property would likely run afoul of the limitations on direct taxes set forth in Sections 2 and 9 of Article I of the Constitution as construed by the celebrated income tax case of *Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 429 (1895). Faced with a somewhat similar challenge, the Third Circuit specifically held that 26 U.S.C. § 5001, the section which imposes the tax and establishes the rate (rather

than determines who is liable), is an excise tax on distillation, *i.e.*, an indirect tax on the *production* of distilled spirits. *Schenley Distillers* v. *United States*, 255 F.2d 334 (3rd Cir. 1958). In that case the Court clearly rejected Schenley's contention that the tax was direct because it was not required to be paid until the whisky was removed from bond or "forced-out" of bond by the operation of 26 U.S.C. § 5006(a)(2), as then written, at the expiration of eight years.

The reports and returns which may be required by the statutory scheme are subject to a parallel construction. 26 U.S.C. § 5555 provides:

> "Every person liable to any tax imposed by this chapter, or for the collection thereof, or for the affixing of any stamp required to be affixed by this chapter, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may require."

We have already concluded that a possessor or concealor is not liable for the payment of the tax. Although it makes § 5555 somewhat redundant, we also conclude that such a person is not liable for affixing the stamps since under 26 U.S.C. § 5205 the purpose of the stamps appears to be the evidencing of payment of the tax or of other compliance with the statutory scheme.

Shoffeitt, then, as a mere possessor or concealor of bootleg whisky, was not obligated to pay the taxes due and owing or to file a tax return or other records. It is this which distinguishes his case from *Haynes* v. *United States*, *supra*, the most similar case in the trilogy. Haynes was convicted of a violation of 26 U.S.C. § 5851, which makes it "unlawful for any person . . . to possess any firearm which has not been registered as required by section

5841." Section 5841 essentially required the registration of any firearm unlawfully obtained,[1] and had previously been held unconstitutional by this and other courts.[2] Section 5851, however, repeatedly had been held constitutional. Although noting the plausibility of Haynes' argument that "nonregistration by 'anyone' must, by the very provisions of Section 5841, necessarily include the present possessor of the firearm," *Haynes* v. *United States*, 372 F.2d 651, 653 (5th Cir. 1967), this Court felt obliged to follow the great weight of authority and affirmed the conviction.

The Supreme Court, of course, was in a position to take a fresh look at the statutes. In support of the constitutionality of § 5851, the United States contended that:

> "the two offenses, despite the similarity of their statutory descriptions, serve entirely different purposes, in that the registration clause of § 5851 is intended to punish acceptance of possession of a firearm which, despite the requirements of § 5841, was never registered by any prior possessor, while § 5841 punishes only a present possessor who has failed to register the fact of his own possession." *Haynes* v. *United States*, 390 U.S. at 90-91.

The Supreme Court rejected the proffered distinction, finding themselves:

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[1]Section 5841 provides in full:

"Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with."

[2]*Lovelace* v. *United States*, 357 F.2d 306 (5th Cir. 1966) and cases cited in *Haynes* v. *United States*, 373 F.2d 651, 652 n. 3 (5th Cir. 1967).

> "unable to escape the conclusion that Congress intended the registration clause of § 5851 to incorporate the requirements of § 5841, by declaring unlawful the possession of any firearm which has not been registered by its possessor, in circumstances in which § 5841 imposes an *obligation to register*. The elements of the offenses created by the two sections are therefore identical." 390 U.S. at 94. (Emphasis added.)

Shoffeitt, not being under any similar obligation, cannot avail himself of the Fifth Amendment privilege. And, although it is arguable that those who are obliged to pay taxes, file returns, and so forth, in connection with distilled spirits, may be able to raise the Fifth Amendment, appellant here does not find himself in one of those "unique situations which . . . has led the Court to proceed without regard to its usual rule" that a person may not claim standing to vindicate the constitutional rights of some third party. *Barrows* v. *Jackson*, 346 U.S. 249, 255-257. Shoffeitt's convictions are therefore

AFFIRMED.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition of John Henry Shoffeitt was deposited in the United States Post Office with Airmail postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington 25, D. C.; and to Charles L. Goodson, Esquire, United States Attorney, Old Post Office Building, Atlanta, Georgia.

This the 20th day of December, 1968.

.....

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